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VIA ECFS

November 25, 2015

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.E.
Washington, D.C. 20554

Re: **Notice of *Ex Parte* Presentations**

*Expanding the Economic and Innovation Opportunities of Spectrum through
Incentive Auctions*, GN Docket No. 12-268

*Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules for
Digital Low Power Television and Television Translator Stations*, MB Docket No. 03-
185

*Policies Regarding Mobile Spectrum Holdings Competitive Bidding Procedures for
Broadcast Incentive Auction 1000, Including Auction 1001 and 1002*, Docket No. 12-
269

*Amendment of Parts 15, 73 and 74 of the Commission's Rules to Provide for the
Preservation of One Vacant Channel in the UHF Television Band for Use by White
Spaces Devices and Wireless Microphones*, MB Docket No. 15-146

*Competitive Bidding Procedures for Broadcast Incentive Auction 1000, Including
Auction 1001 and 1002*, AU Docket No. 14-252

Dear Ms. Dortch:

In accordance with Section 1.1206(b)(2) of the Commission's rules, this letter is submitted on behalf of Free Access & Broadcast Telemedia, LLC ("FAB") to provide notification for the record that on November 23 and 24, 2015, David J. Mallof, principal of FAB, together with the undersigned counsel, met separately with (i) Robin C. Colwell, Chief of Staff, and Erin McGrath, Legal Advisor, in the Office of Commissioner O'Rielly, (ii) Chanelle P. Hardy, Chief of Staff, in the Office of Commissioner Clyburn, and (iii) Matthew Berry, Chief of Staff, in the Office of Commissioner Pai.

All of the issues discussed have been fully laid out in FAB's filings to date in the dockets referenced above. In each meeting, FAB addressed the following points:

1. The Commission still retains ample leeway to address the outstanding issues regarding low power television (LPTV) with dispatch. Specifically, the FAB slide presentation enclosed as Attachment A addresses on page 2 four reasonable fixes to equitably address LPTV's concerns, without risk of any delay in commencement of the reverse incentive auction, in the Commission's auction processes and its upcoming decision on the *Third NPRM* in MB Docket 03-185.
2. Chairman Wheeler's reply letter to Congress of November 16, 2015 (enclosed as Attachment B) addresses in paragraph 6 what will likely be deemed by the courts a sweeping violation of the Regulatory Flexibility Act of 1980 (RFA). In this letter, the Chairman concedes that the statutorily mandated analysis to mitigate harmful adverse impacts on LPTV licensees as small businesses has never been conducted by the Commission. FAB believes that without, at a minimum, repackaging protection, relocation support and technical flexibility in place before the auction begins, the Commission cannot as a legal matter satisfy its obligation to explain the steps it "has taken" to mitigate impacts on LPTV broadcasters.
3. FAB's recent *Motion to Reopen the Record in the Third Notice of Proposed Rulemaking*, submitted in MB Docket 03-185 and enclosed as Attachment C, is a targeted, reasonable and expeditious way to address all outstanding LPTV issues. FAB urged the Commission to grant that motion with a time-limited 30 to 45 day comment period, and thus to embrace transparency so that the so-called "Greenhill 1 Report" and anticipated report from the General Accounting Office can be given appropriate on-the-record consideration.
4. Meeting participants also received an op-ed article published in the November 23, 2015 edition of *BRB-TVBR* entitled "*The March 29, 2016 Start Date for the Spectrum Auction: A Date Set in Foam*," included as Attachment D.

FAB stressed that (a) nothing it has proposed, either procedurally or substantively, could delay commencement of the reverse auction during early 2016, (b) LPTV epitomizes the FCC's commitment to viewpoint diversity, community-based localism, and broadcast opportunities for under-represented constituencies, and thus fully merits being sheltered from the certainty that such broadcasters will be displaced and abandoned during the incentive auction "repack," and (c) the Commission's current trajectory will extinguish LPTV in many major metro markets as a viable broadcast service in contravention of the Spectrum Act's guarantee that the incentive auction may not "alter the spectrum usage rights of low-power television stations." 47 U.S.C. § 1452(b)(5).

Marlene H. Dortch, Secretary

November 25, 2015

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The written materials distributed at these meetings are attached for inclusion in the record. If you have any questions about this submission, please contact the undersigned.

Sincerely,

A handwritten signature in black ink, appearing to read "Glenn B. Manishin". The signature is stylized with a large, sweeping initial "G" and a long, horizontal stroke extending to the right.

Glenn B. Manishin
*Of Counsel to Free Access & Broadcast Telemedia,
LLC*

cc: Robin C. Colwell, Office of Cm. O’Rielly (robin.colwell@fcc.gov)
Chanelle P. Hardy, Office of Cm. Clyburn (chanelle.hardy@fcc.gov)
Erin McGrath, Office of Cm. O’Rielly (erin.mcgrath@fcc.gov)
Gary Epstein, Chair, Incentive Auction Task Force (gary.epstein@fcc.gov)
Howard Symons, Vice-Chair, Incentive Auction Task Force (howard.symons@fcc.gov)

Encl.: Attachment A – FAB Presentation “Nothing is Not Enough”
Attachment B – Letter from FCC Chairman Tom Wheeler to Representative Gus Bilirakis (November 16, 2105)
Attachment C – FAB Motion to Reopen the Record, MB Docket 03-185 (November 11, 2015)
Attachment D – *RBR-TVBR* op-ed article entitled “*The March 29, 2016 Start Date for the Spectrum Auction: A Date Set in Foam*” (November 23, 2015)

ATTACHMENT A

Nothing is Not Enough:
Four Local Low-Power TV “Asks” to
Assure a Successful, Timely Auction



Free Access & Broadcast Telemedia, LLC

Four Local Low-Power TV “Asks” to Assure a Successful, Timely Auction

Goal: Fair play for existing FCC-licensed TV stations consistent with fair-play afforded FCC wireless licensees:

1. Some level of LPTV protection in channel repack -- more spectrum should not be sold by the FCC than the Commission actually buys for resale in the reverse auction or is truly vacant, until existing LPTV licensees are accommodated.
2. Extend auction eligibility under existing FCC authority, as the FCC has stated that it has the power to do.
3. Relocation funded for LPTV under existing FCC Title III authority, on top of the \$ 1.75b for full power & Class As.
4. Assurance in writing of future technical flexibility for all TV broadcasters, the same as wireless licensees have today.

LPTVs always were, and still are,
broadcast television licensees
whose existence needs to be recognized in the incentive auction.

Low-Power TV: What and Why?

- For over 30 years, community-based Low-Power TV (LPTV) has been broadcasting free programming over-the-air.
- In many cases, LPTV provides ethnically and culturally diverse and religious programming.
- Number of operating TV stations :

Auction-eligible:

Full-Power Stations:

1330

“Class A” Low-Power Stations:

362

Other (imperiled):

Community-Based, Low-Power TV Stations:

1573 (26% of the total)

Low-Power “Translator “Stations

2817

TOTAL U.S. OPERATING UHF TV STATIONS

6082

- All broadcasters use the same 6MHz channels, with different footprints.
- At least 15% of US residents rely *only* on free over-the-air stations -- not cable, not satellite, not internet TV.
- This huge and relevant minority segment of the US served by LPTV should be allowed to continue to provide service to the public.

Low Power TV in the Auction Law

- Congress invited Full Power and Class A Low Powers into the Spectrum Auction.
- LPTV was not barred or explicitly excluded.
- Congress assured those invited but who did not sell that they would be reimbursed to move elsewhere.
- It was silent on LPTV relocation reimbursement.
- In the Spectrum Act, Congress was *silent* on LPTV other than to say explicitly that:

“Reorganization of the Broadcast TV Spectrum ...

(5) Low-power television usage rights. –

Nothing in this subsection shall be construed to alter the spectrum usage rights of low-power television stations.”

Under longstanding FCC precedent,

LPTV holds location rights inferior only to Full Power and Class A stations, and superior to all others, including unlicensed users and new aspirant licensees.

Settled Low Power TV Rules at the FCC

- At the FCC, LPTV is secondary only to full Power and Class A stations for signal interference purposes.
- The FCC ordered LPTV to move 8 years ago to make room for new licenses sold in the upper TV band to wireless companies.
- However at that time there was room for all to resettle.
- Now there is no more room, and any FCC order requiring LPTV to defer/move to make way for new licensees and even new unlicensed services would trump the rights of current LPTV licensees.
- Such action would be a “taking.”
- At least one DC Circuit Court decision stands for the proposition that when conditions change, a past FCC administrative law ruling cannot necessarily be rubberstamped again.

LPTV has a firm right of displacement after full power and Class A stations that is superior to new licensees and unlicensed users.

Backup Slides

Diverse Programming and Media Voices

200+ Programming Networks Utilize LPTV

2500+
LOCAL
& DIVERSE
CONTENT
CHANNELS

Sample data from RabbitEars.info – July 2013

# OF NETWORKS	NETWORK CONTENT AND DEMO FOCUS	# OF DTV CHANNELS
43	HISPANIC	850
23	RELIGIOUS	550
33	ETHNIC	182
25	FAMILY/CLASSIC TV	260
13	GOVERNMENT	141
6	SHOPPING	120
5	MUSIC OR AUDIO	153
3	WEATHER	134
3	AFRICAN AMERICAN	100

LPTV is Community Diversity

A 2009 survey of LPTV stations conducted by the CBA (Community Broadcaster Association) discovered the following

- 57% of LPTV stations have been on the air for more than 10 years
- 20% of LPTV stations have at least 10 employees
- 45% of LPTV stations are owned or partially owned by a minority.
 - 43% of these stations a minority owns at least 51% of the station
 - 24% of LPTV owners are Hispanic
 - 10% of LPTV owners are African American
 - 3% of LPTV owners are Asian
 - 3% of LPTV owners are Native American
 - 34% of LPTV owners are multi-racial
- 60% of LPTV stations are owned or partially owned by females.
- 66% of LPTV stations offer at least some foreign-language programming
- 78% of LPTV stations that offer foreign language programming air at least 10 hours weekly of foreign language programming.
- 83% of LPTV stations have local programming
- 49% of LPTV stations that have local programming air at least 10 hours of local programming each week.
 - 55% offer religious local programming
 - 38% offer family oriented local programming
 - 36% offer local sports programming
 - 31% offer local news
 - 28% offer foreign-language local programming

ATTACHMENT B



FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

November 16, 2015

The Honorable Gus Bilirakis
U.S. House of Representatives
2112 Rayburn House Office Building
Washington, D.C. 20515

Dear Congressman Bilirakis:

Thank you for your letter concerning the impact of the upcoming auction on low power TV stations and translators. I agree that LPTV stations and TV translators provide important services upon which many consumers and businesses in rural communities rely. Although the Middle Class Tax Relief and Job Creation Act of 2012 ("Spectrum Act") does not explicitly protect LPTV and TV translator stations in the repacking process, the Commission is taking an array of steps to help mitigate the impact of the auction and repacking process on LPTV and TV translator stations so that the important programming content they provide continues to reach viewers.

As an initial matter, the Commission last year announced that it will open a special filing window for operating LPTV and TV translator stations that are displaced by the repacking and reallocation of the television bands, in order to offer such stations an opportunity to select a new channel.¹ We also modified our rules to allow stations with mutually exclusive displacement applications to reach a settlement or an engineering solution, rather than require competing stations to resolve all mutual exclusivity through an auction as the Communications Act generally requires.² In cases where a settlement is not possible, in order to ensure the continued availability of full power television service, we afforded priority to displacement applications filed by digital replacement translators used to fill in the service areas of full power stations that could not otherwise be replicated when those stations transitioned from analog to digital facilities.³

Additionally, to help accommodate some of the needs of LPTV and translator stations following the auction, the Commission adopted rules that will permit these stations to remain on their existing channels during the post-auction transition period until they are notified that a forward auction winner is within 120 days of commencing operations on the repurposed 600 MHz spectrum.⁴ For many LPTV and translator stations that are located in the new 600 MHz Band, this could mean continued operations for many years until wireless licensees commence operations.

¹ See *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GH Docket No. 12-268, Report and Order, 29 FCC Rcd 6567, 6834-35, para. 657 (2014) ("*Incentive Auction Report & Order*").

² *Id.*, para. 661.

³ *Id.*

⁴ *Id.*, para. 661.

Recognizing the importance of LPTV and TV translator stations, the Commission also opened a dedicated proceeding to consider additional means to mitigate the potential impact of the incentive auction and the repacking process on LPTV and TV translator stations to help preserve the important services they provide.⁵ Today, I circulated proposed rules to my fellow commissioners and I expect that the Commission will act on the proposals put forward in this proceeding later this fall. Those proposals include a range of options to help enable LPTV and TV translator stations remain on the air. First, we have proposed extending the digital transition date for LPTV and TV translator stations until 12 months following the completion of the 39-month post-incentive auction transition period. This extension would prevent stations from having to upgrade facilities to meet the digital transition deadline before knowing whether the station would be displaced by the auction repacking process. Second, we have proposed allowing channel sharing by and between LPTV and TV translator stations.

Channel sharing arrangements could mitigate the effects of repacking displacement by allowing stations to share the remaining television channels and will facilitate the continued viability of LPTV through new programming and business arrangements that promote spectral efficiency.⁶ Third, in response to concerns that finding a new channel for displaced LPTV and TV translator stations will be challenging, we have also proposed to use our auction optimization and repacking software to assist LPTV and TV translator stations identify available channels and potentially maximize the number of such stations in the TV band post-auction.⁷ Of course, a station's decision to seek channel assignments recommended by the optimization software would be completely voluntary, but I believe that the use of our software will expedite and ease the post-auction transition process for many LPTV and TV translator stations.

The auction will by definition result in a smaller TV band and, therefore, fewer channels for all television stations – full power as well as LPTV and TV translator stations. The Commission has recognized that the auction will potentially displace a significant number of LPTV stations.⁸ However, in light of Congress's determination not to include LPTV or TV translator stations in the auction or protect them in repacking, we have not systematically analyzed the potential displacement impact on those stations. Similarly, because LPTV and TV translator stations are not entitled to protection in the repacking process, no assumptions regarding them are necessary to conduct auction simulations or repacking analyses; LPTV and TV translator stations do not factor into such analyses.

Since Congress enacted the Spectrum Act, the FCC has sought to faithfully implement its mandate, while mitigating the potential impact on broadcaster and other services that currently use the broadcast band, including LPTV and TV translator stations. I am confident that the steps

⁵ *Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules for Digital Low Power Television and Television Translator Stations*, MB Docket NO. 03-185, Third Notice of Proposed Rulemaking, FCC 14-151 (rel. Oct. 10, 2014) ("*LPTV NPRM*").

⁶ *LPTV NPRM*, para. 14.


⁷ *Id.*, para. 44 et seq.

⁸ Incentive Auction Report and Order, 29 FCC Rcd at 6834-35, paras. 656-57.

Page 3—The Honorable Gus Bilirakis

I have described above will help ensure the continued availability of LPTV and TV translator services post-auction.

Sincerely,



Tom Wheeler

ATTACHMENT C

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Amendment of Parts 73 and 74 of the)	MB Docket No. 03-185
Commission's Rules to Establish Rules for)	
Digital Low Power Television and)	
Television Translator Stations)	
)	
Expanding the Economic and Innovation)	GN Docket No. 12-268
Opportunities of Spectrum through Incentive)	
Auctions)	

To: The Commission

MOTION TO REOPEN THE RECORD
IN THE THIRD NOTICE OF PROPOSED RULEMAKING

Free Access & Broadcast Telemedia, LLC ("FAB"), by counsel, hereby respectfully requests that the Commission reopen the record in the *Third Notice of Proposed Rulemaking* ("*Third NPRM*")¹ and allow interested parties to comment after the Commission discloses for the record: 1) the assumptions and related auction models projecting impacts on Low Power Television ("LPTV") stations underlying the so-called Greenhill 1 Report released in October 2014,² and 2) the analysis the Commission receives from the Government Accountability Office

¹ Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules for Digital Low Power Television, Television Translator, and Television Booster Stations, MB Docket No. 03-185, *Third Notice of Proposed Rulemaking*, 29 FCC Rcd 12536 (2014) ("*Third NPRM*"). In an *Order*, DA 14-1727, released December 1, 2014, the Commission specified deadlines of January 12, 2015 for filing Comments and January 26, 2015 for filing Reply Comments.

² *Incentive Auction Opportunities for Broadcasters: Prepared by the Federal Communications Commission by Greenhill* (the "Greenhill 1 Report"), released October 1, 2014 and available at <http://apps.fcc.gov/ecfs/document/view?id=60001012317>.

(“GAO”) regarding the anticipated effects of the incentive auction on LPTV, as requested by leading Members of Congress.³

In support of this Motion, the following is submitted:

I. FCC Recognition of LPTV’s Vital Service To Viewers

The FCC established LPTV stations to reach underserved communities, recognizing that such stations can positively affect the Commission’s goals of localism and diversity. According to the FCC’s website:

The Low Power Television Service (LPTV)...was primarily intended to provide Opportunities for locally-oriented television service in small communities, both rural and individual within larger urban areas. LPTV presents a less expensive and very flexible way of delivering programming to the interests of viewers in small localized Areas, providing a means for local self-expression. In addition, LPTV has created abundant opportunities for new entry into television broadcasting and has permitted fuller use of the broadcast spectrum.⁴

The Commission has repeatedly underscored the importance of LPTV stations to their local communities and in the context of the digital television transition, has taken steps to ensure the ongoing viability of LPTV service.⁵ LPTV and TV translator stations provide service where there are no other viable television outlets and are essential sources of diversity in television programming and ownership.⁶ Prior to the recent auction rulemaking process, the Commission routinely highlighted over many years the ingrained value of LPTV stations as providers of

³ See letter to the GAO dated October 1, 2014 from Representatives Anna Eshoo (CA) and Joe Barton (TX) to Gene L. Dorado, Comptroller General of the United States (“Barton/Eshoo Letter”). Attachment A.

⁴ <https://www.fcc.gov/encyclopedia/low-power-television-lptv>

⁵ See e.g., Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, Sixth Report and Order, 12 FCC Rcd 14588 ¶141-47 (1997).

⁶ Third NPRM, ¶ 1.

diverse programming options, ownership opportunities for minorities and women and as a lifeline where LPTV stations provide the only means for obtaining free over-the-air television.

II. The Third NPRM: The Existential Threat To LPTV

On October 10, 2014, the Commission released its *Third Notice of Proposed Rulemaking* seeking comment on measures to facilitate the final conversion of LPTV and TV translator stations to digital service and ways to mitigate the potential impact of the incentive auction and the spectrum “repacking” process on such stations. The Commission discussed a series of possible future measures intended to “alleviate” the negative consequences to LPTV and TV translator stations as a result of the auction and channel repacking. *Third NPRM*, ¶ 3.

The stakes in this proceeding are very high for LPTV stations -- literally, a matter of life and death. The Commission remarkably and specifically acknowledged, without fashioning any present regulatory safeguards, the uncontested fact that “a significant number [of LPTV stations] may be displaced as a result of the auction or repacking process and required to find a new channel from the smaller number of channels that will remain in the reorganized spectrum or discontinue operations.” *Third NPRM*, ¶ 2. It merely solicited comment on “additional measures we should consider in order to mitigate the impact of the incentive auction on LPTV and TV translator stations and to help preserve the important services they provide,” asking commenters to describe in detail “any perceived benefits and disadvantages of the measures advocated.” *Third NPRM*, ¶ 59.

To facilitate the submission of informed and meaningful comments, the Commission should have shared with interested parties the analysis it possesses on the stranding of LPTV stations. However, to date, the Commission has not afforded interested parties the opportunity to review and critique the so-called inputs in the Greenhill 1 Report, *i.e.*, assumptions and variables

the FCC used in assessing the auction’s impact on licensed broadcast television stations. FAB and other LPTV stakeholders need access to the data and analyses the Commission surely has in hand as factual matters. This is the data that enabled the Commission to synopsise and outline specific projections that led to publishing the summary report prepared for the FCC by its outside investment banker consultants (Greenhill & Co.) to promote the incentive auction nationwide. The underlying assumptions and outputs of the FCC analyses that gave rise to the business case summarized in that Greenhill Report remain central to the Commission arriving at thoughtful and transparent policy considerations needed to mitigate the conceded negative impacts on LPTV.

III. The FCC’s Commitment to Consider LPTV Impacts at a “Future Time”

The Greenhill 1 Report summarizes the expected auction dynamics of clearing 21 TV channels (126 MHz), including LPTV stations, in every one of 210 markets, but only references the expected sums to be paid to an unspecified number of auction-eligible (i.e., non-LPTV) stations to achieve that target clearing objective. The results summarized in the Greenhill 1 Report thus implicitly, if not explicitly, reflect a sweep of possible impacts on LPTV. The report was released to the public to kick off investment banking roadshows across the country two weeks **after** the deadline for petitions for reconsideration regarding the *First Report and Order*.⁷

In its December 2014 *Motion to Toll the Comment and Reply Comment Deadlines in the Third Notice of Proposed Rulemaking*, filed before the beginning of the comment cycle, FAB asked for the release of information on LPTV auction impacts. The Commission made a commitment in its January 8, 2015, *Order* denying that Motion to consider impacts to LPTV at “a future date.”⁸ And yet in its *Second Order on Reconsideration* (“*Second Order*”), released on

⁸ See *Order*, DA 15-31, released January 8, 2015, ¶.7.

June 19, 2015, the FCC thereafter claimed that it does not have *any* data regarding impact of the clearing and repacking processes on LPTV stations. This statement is not credible in light of the admission by the Vice-Chair of the FCC’s incentive auction task force (IATF)⁹ that the Commission had of course conducted an analysis of LPTV:

“We did look at LPTV, the impact on low-power TV stations, as we were planning the auction, but as Mike [Gravino, Director, LPTV Spectrum Rights Coalition] indicated, our starting point is obviously the statute, what Congress told us to do and the limitations Congress imposed on us, and so we are acting pursuant to those statutory directives.”

If LPTV data were not actually included in the analysis used to generate the Greenhill 1 Report, LPTV licensees would have to have been treated as if they were non-existent. Surely, that was not the intent of Congress in the Spectrum Act. The Act expressly provides that the rights of low-power television must not be altered in the auction process: “Nothing in this subsection [authorizing the incentive auction] shall be construed to alter the spectrum usage rights of low-power television stations.” 47 U.S.C.¶ 1452(b)(5). Moreover, in order to clear 126 MHz of spectrum at very specific prices by designated market area (“DMA”), the Commission necessarily had to make assumptions about LPTV and the outputs of stations remaining on the air by DMA -- assumptions that were capable of generating \$37 billion in reverse auction purchases and \$45 billion in forward sales resulting in a loss of 60% of the U.S. broadcasting spectrum.

To make accurate and reliable projections about the nationwide clearing of 126 MHz of spectrum and to generate precise and highly differentiated reverse auction purchase prices, the

⁹ It is not known whether a transcript from this interview of Howard Symons on NPR’s *The Kojo Nambdi Show* is now available. For the audio record from WAMU 88.5 Radio on August 12, 2015, go to <https://thekojoonnamdishow.org/audio/#/shows/2015-08-11/tt-fcc-spectrum-auction/89449/@00:00> at minutemark 13:30 (last visited November 11, 2015).

Commission certainly must have assessed the impact upon LPTV. All FAB requests by this motion is the opportunity for the public to review, comment and critique those key “impacts” and “outputs,” which is the minimum process applicable under the Administrative Procedure Act to on-the-record administrative rulemakings.

IV. The Forthcoming GAO Report On LPTV Impacts

Representatives Barton and Eshoo have requested that the GAO evaluate the “impact” of the incentive auction on LPTV and TV translator stations, including (a) the projected number of LPTV and TV translator stations that are likely to lose their channels as a result of the auction and the repacking without the availability of replacement channels, (b) the number of viewers who will lose broadcast access to an LPTV station and (c) the projected costs of relocation for LPTV stations that receive a replacement channel.¹⁰ *See* Attachment A. This is information the Commission should make publicly available before finalizing “life and death” decisions about the fate of LPTV stations.

The Barton/Eshoo letter underscores the importance of disclosing this information at the earliest possible time. The letter is dated the same day the Commission released the Greenhill 1 Report to the public. The Commission could have released 13 months ago as much of the LPTV impact data requested by Congress for clearing 126 MHz (and likely also for clearing 84 MHz instead) that was already in hand on the very same day that Representatives Eshoo and Barton wrote to the GAO.

¹⁰ Since the issuance of the letter to the GAO, members of the Commission’s staff have acknowledged on several occasions their awareness of the letter. *No impact analysis has been released.*

V. Members of Congress Continue To be Concerned About the FCC's Continuing Failure To Disclose LPTV Impacts

In a letter dated October 22, 2015, four members of the House Energy & Commerce Committee asked Chairman Wheeler for a detailed status report on how the LPTV incentive auction will impact translator stations.¹¹ They expressed concern that “following the FCC’s broadcast incentive auction there may not be sufficient spectrum to accommodate LPTV stations and translators, potentially forcing them to cease operations.” The Commission was asked to provide by November 18, 2015:

1. A detailed status of the Commission’s open rulemaking on considering additional means to mitigate the potential impact of the incentive auction and the repacking process on LPTV and TV translator stations to help preserve the important services they provide (Docket No. 03-185 and No. 12-268), specifically addressing whether this rulemaking will be completed well before auction.
2. The provision of whatever analyses and studies that have been conducted by FCC staff and consultants on the impacts on possible stranding or effective extinguishment of LPTV stations in an auction that clears 126 MHz in the reverse stage and sells 100 MHz in the tandem forward event nationwide in all markets that the FCC staff and the Commission investment banking agents have been marketing. These forecasted LPTV clearing effects should be provided by TV market.
3. The release of any alternate scenarios already in-hand that provide ranges of impacts upon LPTV for clearing down to 84 MHz and up also up to 132 MHz of

¹¹ Representatives Renee Ellmers (NC), Gus M. Bilirakis (FL), Kevin Cramer (ND) and Billy Long (MO). Attachment B.

spectrum, as have appeared in various FCC public statements as possible auction goals and outcomes.

VI. The Need for Immediate Action To Prevent Judicial Remand

The FCC to date has not released what it has modeled over many months (and millions of dollars in staff and consulting time) regarding the sweep of potential impacts of the incentive auction on LPTV stations. On this basis alone, FAB believes a federal appellate court is likely to reverse and remand the Commission's decisions in this proceeding under the Administrative Procedure Act. 5 U.S.C. § 706(2)(a). Also, in FAB's view, the Commission has violated the Regulatory Flexibility Act of 1980 by failing to thoroughly analyze the potential adverse economic impacts on low-power television stations as small entities, and by failing to demonstrate that the Commission "has taken" steps to "minimize the significant economic impact" of its incentive auction rules on low-power television stations. 5 U.S.C. §§ 604(a), 605(b). Furthermore, unless prompt disclosure on modeled impacts in hand is released,¹² the Commission has exceeded the scope of its lawful authority by failing to consider relevant factors, including the significant costs of its actions on LPTV stations.¹³

Once the key information outlined above is released, the Commission should reopen comments in the *Third NPRM*. If a Report and Order were to be adopted without giving interested parties the opportunity to review that crucial data, the integrity and completeness of

¹² See *Free Access & Broadcast Telemedia, LLC, et al. v. FCC*, No. 15-1346 (D.C. Cir.).

¹³ See *Michigan v. EPA*, 135 5. Ct. 2706 (2015) (EPA acted unreasonably when it deemed cost irrelevant to the decision to regulate power plants).

the rulemaking, along with and the statutorily-required Initial Regulatory Flexibility Analysis and Final Regulatory Flexibility Analysis, will by definition be compromised.¹⁴

It is nearly impossible for FAB and other interested parties to conduct the analysis requested by the Commission to delineate a benefits and disadvantages (a.k.a. benefit-costs) in a timely fashion before a *Third Report and Order* is issued without:

- access to the underlying assumptions that flowed into and formed the basis of the resulting quantified and precise Greenhill 1 Report representations, which are still actively being marketed by the FCC to auction-eligible broadcasters for the 210 U.S. DMAs;
- access to the GAO's independent analysis of LPTV impacts for the extensively modeled scenarios clearing both 126 MHz and alternately 84 MHz;
- release of the projected expected impacts on LPTV that will enable interested parties to offer meaningful proposals on how the Commission can and should mitigate the harmful impact of the auction on LPTV licensees;¹⁵ and
- affording a fair opportunity for interested parties to analyze the requested disclosures above and the GAO results.

In light of the foregoing, FAB again requests that the Commission place into the public record at the earliest possible time the assumptions and related auction models projecting impacts underlying the Greenhill 1 Report. It is now almost 11 months *after the deadline* for

¹⁴ In a December 15, 2014 letter to FCC Chairman Hon. Tom Wheeler and Hon. Dr. Winslow Sargeant, Chief Counsel for Advocacy at SBA, FAB asked that the FCC supplement the record and correct the inaccurate finding in the *First Report & Order* in Docket No. 12-268 that no parties raised any issues related to the Initial Regulatory Flexibility Analysis in the Notice of Proposed Rulemaking. See Attachment C.

¹⁵ FAB also filed a Freedom of Information Act request on August 20, 2015 (FCC FOIA Control No. 2015-729 and FOIA Online number FCC-2015-000729). This request in part is under appeal and in part is still in process.

filing reply comments to the *Third NPRM*. Once this material is included in the docket, interested parties should be given 30 days to submit comments. This will allow parties sufficient time to submit a new round of Comments and Reply Comments to the *Third NPRM* based on the Commission's analysis of the full range and scope of the impacts on LPTV licensees.

Because the Commission has not yet acted on the outstanding requests to release LPTV impact data, acceptance and consideration of this Motion will not delay action in the *Third NPRM* rulemaking. Further, the IATF and FCC consultants already have the requested analysis and outputs in hand. Release of this information will increase the transparency of the Commission's decision-making process and most importantly, provide vitally important information for affected parties whose interests are at a stake in this proceeding.

For all these reasons, FAB requests that the Commission grant this Motion to Reopen Comments and Reply Comments for the *Third NPRM* until 30 days after both the requested disclosures and GAO Report are entered into the record in Docket Nos. 12-268 and 03-185.

Respectfully submitted,

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November 11, 2015

Attachment A: Letter from Reps. Eshoo and Barton to the GAO), dated October 1, 2014
Attachment B: FAB Letter to FCC Chairman Wheeler and SBA Chief Counsel for
Advocacy, dated December 15, 2014
Attachment C: Letter to FCC Chairman Wheeler from Reps. Ellmers, Bilirakis, Cramer
and Long, dated October 22, 2015

GSB:7280951.3

ATTACHMENT D

The March 29, 2016 Start Date for the Spectrum Auction: A Date Set in Foam

As appeared in RBR-TVBR November 23, 2015
<http://rbr.com/march-29-spectrum-auction-start-date-is-set-in-foam/>

Op-Ed by D.A. Selby*

The broadcast incentive auction is scheduled to kick off at the end of the first quarter of 2016. If all goes well, there will be reason for celebration for the broadcast and wireless communities and for the American public.

But [will the FCC “screw the pooch,” as the Mercury astronauts used to say?](#) This is quite possible, primarily via the FCC’s plan to shut down or marginalize some broadcasters who hold FCC licenses.

Here is the bottom line for broadcasters: Many stations might submit applications to the FCC during the December 8th to January 12th period expressing interest in participating in a possible reverse auction. But during the December to March period, all broadcasters should *insist* that the FCC give written assurance that the licensing process is not rigged to the detriment of licensed LPTV and translator stations.

The FCC must assure its stakeholders that its planned auction does not overcommit spectrum beyond the bounds of the necessary analysis – that apparently has not been conducted. Otherwise it is hard to imagine how the desired outcomes of the auction will ever be realized. In the end, the boards of directors and stockholders of private and public broadcast stations should not proceed into the auction room given the current stakes if the FCC gets it wrong.

FCC Chairman Tom Wheeler is apparently focusing on only the first hurdle in what is really an Olympian hurdling event. Clearing the initial reverse auction hurdle may well land the FCC flat on its face, if its stride is not right to commence the forward auction and then clear the final licensing leap.

A major issue is the FCC’s looming proposal to hand out free beachfront property in every DMA to Google and Microsoft. Besides being an act of piracy against broadcast’s already diminished spectrum, it would be a breach of [Section 309\(j\)\(1\)](#) of the Communications Act and a breach of the FCC’s fiduciary duty to the

American public to treat these conglomerates as bidders, rather than as crony corporate welfare recipients.

And even if the FCC backs off this dubious policy, it will have yet another major hurdle to overcome – abused and outraged community-based low power television broadcasters holding 4,400 licensed stations that dwarf the 1,700 stations invited into the auction room.

In the auction as currently structured, many LPTV stations will likely be annihilated outright, especially [in the top 30 DMAs where 54% of the U.S. population resides](#). Despite over a year and a half of modeling analysis and entreaties for information from affected parties, the FCC continues to refuse to disclose the likely scope of the looming wipeout.

Many LPTV stations will be forced to pay for the “privilege” of moving to a new channel, if one can even be found after the favored carriers take licenses from incumbent broadcasters. Relocating is a daunting expense for operating LPTVs. [As a point of reference, LPTVs previously paid to move eight years ago after the last auction when there was still spectrum for all to find new channels.]

Like all FCC licensees, LPTVs are going concerns that expect to continue to operate. In short, they have rights.

And they have support in high places. Leading members of Congress who had a hand in writing the auction legislation have informed the FCC that bulldozing LPTVs and TV translators was never part of the plan.

On November 16th, Chairman Wheeler responded to four US House of Representative members led by Rep. Renee Ellmers (R-NC). They had asked the Chairman to report back on LPTV impacts the Commission envisioned based on the robust auction modeling scenarios the agency prepared with great precision over a period of 18 months.

Mr. Wheeler told Congresswoman Ellmers that the FCC had no modeling whatsoever incorporating LPTV. However, in order to meet its target of cleared television spectrum, surely the FCC has a precise idea of the impacts LPTV will suffer, if not economically, then certainly in terms of lost spectrum “cleared” in each of 210 DMAs which the Commission admits have been extensively modeled. It is impossible to believe that in structuring and promoting the auction, the FCC does not have this analysis.

Failure to consider and disclose how the small companies operating LPTVs will be impacted is in violation of the Regulatory Flexibility Act of 1980, which requires a study of any economic impact on small businesses caused by a new body of regulation. This violation has been brought to the attention of the DC Circuit Court of Appeals, where a lawsuit has been filed.

We have to wonder if the FCC will allow the past to be prologue when it comes to the incentive auction.

As a case in point, in the 1990s, the FCC attempted to roll over financially troubled NextWave in a spectrum proceeding, reselling bandwidth NextWave had won at auction and ignoring the fact that the company was in federal court under bankruptcy protection. The Commission was rebuffed in [a case that went all the way to the US Supreme Court](#). Wireless companies like Verizon had billions in capital tied up in deposits at the US Treasury. Benefits the American people might have enjoyed from the spectrum sale were greatly diminished by [the FCC's headlong rush to license new spectrum rights that were not "clean" to resell](#).

The stakes are very high. The FCC needs to get this right. It should scrap the unlicensed spectrum-grab plan and treat LPTV and TV translator stations in a fair and equitable manner.

FCC Commissioner Ajit Pai has warned that it is far more important to get the auction right than to hew to an artificial deadline. Chairman Wheeler's rush to start the auction will cast a massive shadow of doubt not only over broadcasters that relinquish spectrum and wireless companies that seek to invest in spectrum, but also over broadcast viewers, advertisers, shareholders, debt holders and the community-based programming currently enjoyed by the American public.

All will twist in the wind in a state of uncertainty while the FCC tries to deal with hurdles that may not be cleared in its reckless race to the finish line.

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* Given the anonymity which the FCC has allowed in behind-closed-door meetings and in other *ex parte* presentations in the "public" incentive auction proceeding, a pen name is used here as a matter of rhetorical balance. Googling "D.A. Selby" reveals a tip of the hat to the legal acumen of Erle Stanley Gardner,

who occasionally used a pen name. For the prior still valid op-ed contribution by the author, [click to see RBR-TVBR from March 7, 2015.](#)

Links used:

Paragraph 2 ...will the FCC “screw the pooch,” as the Mercury astronauts used to say?

http://www.slate.com/blogs/lexicon_valley/2014/01/14/screw_the_pooch_etymology_of_the_idiom_dates_back_to_nasa_and_the_military.html

Paragraph 6 Section 309(j)(1) of the Communications Act:

<https://www.law.cornell.edu/uscode/text/47/309>

Paragraph 8 Population/HHs in the top 30 DMAs:

<http://www.tvb.org/media/file/2015-2016-dma-ranks.pdf>

Paragraph 16 License case that went all the way to the Supremes:

https://en.m.wikipedia.org/wiki/NextWave_Wireless

Paragraph 16 The FCC’s failed headlong rush documented in the *LATimes*:

<http://articles.latimes.com/2003/jan/28/business/fi-nextwave28>

Concluding RBR link to D.A Selby’s first prescient piece:

<http://rbr.com/the-illusion-of-a-2016-incentive-auction/#grJPI6EASxDpreLj.99>